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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

15-cr-616 (KBF)

5 DARCY WEDD,

6 Defendant.

7 -----x

8 New York, N.Y.

9 April 2, 2018

1:05 p.m.

10 Before:

11 HON. KATHERINE B. FORREST

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 Interim United States Attorney for the
16 Southern District of New York

17 BY: SARAH E. PAUL, ESQ.

18 RICHARD A. COOPER, ESQ.

JENNIFER BEIDEL, ESQ.

Assistant United States Attorneys

19 SERCARZ & RIOPELLE, L.L.P.

Attorneys for Defendant

20 BY: MAURICE H. SERCARZ, ESQ.

21 ROBERT CALIENDO, ESQ.

-and-

22 MARC FERNICH, ESQ.

Attorney for Defendant

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(In open court)

THE CLERK: In the matter United States of America v.
Darcy Wedd, 15-cr-616.

Counsel, please state your names for the record.

MS. PAUL: Good afternoon, your Honor. Sarah Paul,
Rich Cooper, and Jennifer Beidel for the government.

THE COURT: Good afternoon, folks.

MR. SERCARZ: For the defendant Wedd, Maurice Sercarz,
Robert Caliendo, and, your Honor, Marc Fernich is in the
courtroom. He will be representing Mr. Wedd in any post-
sentencing matters. Is it all right if he comes up to the
front table and joins us?

THE COURT: Absolutely.

MR. FERNICH: Thank you, Judge.

THE COURT: Of course.

All right. The Court notes that Mr. Wedd is here and
present. Good afternoon.

All right, folks. You can all be seated.

The Court also notes that there are several dozen
people here in the audience, and I assume that a number of them
are here for Mr. Wedd, and while I recognize some folks from
the U.S. Attorney's Office, I think the majority of people are
here for Mr. Wedd.

So let's go ahead and get ourselves started. I
typically start the sentencing proceedings by stating for the

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1 record the counts of conviction and then also the materials
2 that I have received as part of this proceeding, to make sure
3 that we have a common universe. And then after that we'll go
4 on to the PSR, then to the guidelines, and after that we'll
5 have statements from counsel and then from Mr. Wedd if he would
6 like to address the Court.

7 So the counts of conviction fall under really two
8 buckets of counts. There's Counts One through Four, which
9 relate to the Tatto scheme, and then five through eight relate
10 to Zhenya. The first count is a conviction of conspiracy to
11 commit wire fraud. The second is wire fraud. The third is
12 aggravated identity theft. The fourth is conspiracy to commit
13 money laundering. That's all with respect to the Tatto scheme.
14 Then for the Zhenya scheme there is conspiracy to commit wire
15 fraud, wire fraud, aggravated identity theft, and conspiracy to
16 commit money laundering. So those are the counts of
17 conviction.

18 I have received several submissions from the defense:
19 a sentencing submission dated March 19, 2018, attached to which
20 are a number of letters. I have received a total, between that
21 submission, a submission on March 29th, a submission today, and
22 then two letters that came in on their own, a total of 57
23 months for Mr. Wedd. And I've also received, as an attachment
24 to the March 19th submission from the defense, a submission
25 from a sentencing specialist.

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1 I've also received a sentencing submission from the
2 government dated March 26, 2018 and a copy of a revised
3 presentence investigation report dated March 9, 2018.

4 So those are the materials that I have received. Are
5 there things that you folks think I should have that I have not
6 mentioned? I should also say, just so that it's clear, I of
7 course presided over the trial, as you folks know, over three
8 trials, and so I'm very familiar with the trial record in this
9 matter. But I'm taking that as an assumed body of material.

10 Anything from the government that I should have that I
11 haven't mentioned?

12 MR. COOPER: No, your Honor.

13 THE COURT: All right. Mr. Sercarz.

14 MR. SERCARZ: No, your Honor. You covered it. I
15 thought I noticed a quizzical look from my friend, Mr. Cooper.
16 The letter from the sentencing specialist was also an exhibit
17 to our thick submission.

18 THE COURT: Yes. It's Exhibit G as in George. It's
19 Joel Sickler. And I just separate it because there are letters
20 otherwise that are broken into a number of categories, and then
21 there's that piece.

22 All right. The PSR, let's go on to, then, the PSR.
23 Mr. Sercarz, have you had an opportunity to review the PSR with
24 your client?

25 MR. SERCARZ: Yes, your Honor.

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1 THE COURT: And I note that there were a number of
2 modifications to the PSR that appear to have occurred during
3 the back-and-forth of the drafting process, but are there any
4 additional modifications that you believe should be made to the
5 PSR, or objections that you have to the factual statements in
6 the PSR?

7 MR. SERCARZ: None beyond what is contained in my
8 submission, your Honor.

9 THE COURT: All right. As I understand your
10 submission in terms of the issues that are raised, they're
11 largely with regard to the guidelines calculation, which I do
12 not adopt as a matter of course. I would only adopt the
13 factual statements in the PSR. Are there any factual errors
14 that you believe have been unaddressed in the PSR?

15 MR. SERCARZ: No, your Honor.

16 THE COURT: OK. Mr. Wedd, it is my practice always to
17 ask the defendant himself if you know of any factual errors in
18 the PSR.

19 THE DEFENDANT: No, your Honor.

20 THE COURT: All right. And Mr. Sercarz, you have
21 reviewed the PSR with your client?

22 MR. SERCARZ: I have, your Honor.

23 THE COURT: All right. Does the government have any
24 factual modification to or objections to the PSR?

25 MR. COOPER: No, your Honor.

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1 THE COURT: The Court does adopt the factual statement
2 in the PSR. The PSR will be made part of the record in this
3 matter and filed under seal. If an appeal is taken, then
4 counsel on any appeal may have access to the PSR without any
5 need for further application to the Court.

6 Let's then go on to the next sort of series of points,
7 which have to do with the guidelines calculation. As you folks
8 know, the Court is required to correctly calculate the
9 guidelines for every defendant, and that is true irrespective
10 of whether the Court is going to follow the guidelines. The
11 guidelines are not to be taken as reasonable; they are to be a
12 guide for the Court. Here, there are a number of arguments
13 that have been presented, both by the defense against what
14 probation has calculated as the guidelines and by the
15 government in response to the defense arguments. So what I
16 would like to do right now is to go through the guidelines, to
17 tell you how I propose that they be calculated, without
18 reaching a final resolution on that calculation until I've
19 given you folks an opportunity to address the Court again. I
20 don't need you to restate a point that you've made in your
21 submission, though if you want to -- for the guidelines,
22 although if you want to reiterate them, I'm not going to stop
23 anyone. But I want to make sure that you understand I'm not
24 thinking anybody has waived their arguments on the guidelines
25 by not reiterating them right now.

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1 So, as you folks know, because there are multiple
2 counts of conviction, the Court does undertake a grouping
3 analysis, and that ultimately leads us to 2B1.1(a)(1). We are
4 at, with an offense level of 7 -- I don't think there's any
5 dispute about that because the counts of conviction that lead
6 us to 2B1.1 are counts which carry a 20-year maximum sentence.
7 So that leads us to an offense level, base offense level, of 7.

8 The first set of issues that are disputed between the
9 parties here have to do with the loss amount. As you folks
10 know and briefed, under the guidelines, the loss amount can be
11 based upon a couple of things. One is actual loss -- I should
12 say reasonably foreseeable actual loss. The other is intended
13 loss. So I've reviewed the guidelines. I'm not going to
14 recite all of the guidelines language right now. But I've
15 reviewed the guidelines and the application notes. I've also
16 reviewed the parties' arguments on the guidelines.

17 It does appear to me that the loss amount of greater
18 than 65 million but under 150 million, that that range does not
19 include the content providers. Now, let me tell you how I
20 arrive at that. It is based both upon testimony, but,
21 importantly, it's based upon the extrapolation of what Zhenya
22 would have received or what Miao would have received, what the
23 amount of the schemes would have been when you look only at the
24 percentage of the amount that was received by the defendant and
25 his co-conspirators. In other words, when you look at GX 1401,

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1 that gives you, I think, a misleading view. First of all, GX
2 1401 includes both content provider money, which is not
3 includable, and everyone agrees is not includable and should
4 not be included, but also, it only includes those amounts paid
5 to the co-conspirators, who were working for Mobile Messenger.
6 It doesn't include all of the amounts that were being paid to
7 others. And so you have to sort of extrapolate up, if you
8 will, from that document. So that document only gives us a
9 piece of the picture, and you need to go to other sources.

10 The other sources for that are the testimony of Miao,
11 the testimony of Pajaczkowski, and the overall testimony
12 relating to the Zhenya scheme and to the Miao scheme. The Miao
13 scheme had an overall amount of \$112 million. And the Tatto
14 scheme the Zhenya scheme had an overall loss amount of \$41
15 million. So it's \$153 million all together. That's based upon
16 the gross amount that was attributable to those.

17 The first point I want to make is, I believe that the
18 \$153 million is well grounded and supportable as noncontent
19 provider receipts. I want to ask the defense, who had asserted
20 in their papers that it included content providers, whether or
21 not -- and you're not waiving your other arguments as to how it
22 may overstate Mr. Wedd's culpability or anything else, but just
23 in terms of the amounts attributable to the two schemes,
24 whether or not you've got a basis to say that it really only
25 can relate to the content provider schemes, because the way I

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1 look at it, I don't think it does.

2 Mr. Sercarz.

3 MR. SERCARZ: Your Honor, I think you're right to the
4 degree that you can get above \$65 million without including any
5 of the content provider money. I don't intend to belabor the
6 issues very much at all beyond the lengthy submission that I
7 made dealing with these subjects, but I want to point out two
8 things. Leave aside the content provider money. With regard
9 to the Tatto scheme, I think the Court still has a decision to
10 make about whether or not to include within the scope of the
11 conspiracy money that Tatto made auto-subscribing on the
12 aggregation platforms of aggregators other than Mobile
13 Messenger, because I think that accounts for a lot of the money
14 in Government's Exhibit 1401. It accounts for the wide range
15 that the government has provided.

16 With regard to the Tatto scheme, there was also an
17 issue as to whether or not it was reasonably foreseeable to my
18 client and a part of the conspiracy that Tatto, or Mr. Miao in
19 particular, would take it upon himself to auto-subscribe all of
20 the phone numbers that he was given. I dealt with this in my
21 submission, but the Court is aware of Mr. Miao's version of the
22 conversation that took place in San Diego and
23 Mr. Pajaczkowski's playbook and the instructions that called
24 upon Mr. Miao to auto-subscribe only one third or thereabouts,
25 30 percent to be more precise, of the customers whose phone

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1 numbers he had been given for that purpose.

2 With regard to the Zhenya conspiracy, I think there is
3 an open question, even if you adopt the government's version of
4 what took place and the money paid to the four Mobile Messenger
5 executives was the proceeds of auto-subscribing to be split
6 among the four executives rather than revenue sharing in
7 exchange for the preprovision short codes, even if you accept
8 that, it's still an open question, I respectfully submit,
9 whether all of the money that Zhenya paid to MBKSE Ventures,
10 which is the beginning of the long, circuitous trail by which
11 money reached the four Mobile Messenger executives, as to
12 whether all of that money was indeed the proceeds of
13 auto-subscribing.

14 And I say that because if it's 65 million or less, you
15 come down two points. And I say it while I'm on my feet, fully
16 mindful that I am hoping at the end of this proceeding to
17 receive some solace from *United States v. Crosby*, which says in
18 effect that if a defendant can be found at one of two adjacent
19 guidelines calculations and the court sees fit at the end of
20 the day to impose a nonguidelines sentence, that the court does
21 not, if I understand the case correctly, even have to make a
22 choice.

23 THE COURT: Well, let's just cut to the chase in one
24 respect, which is that the guidelines calculated in a variety
25 of different ways would lead to an offense level of 43. I

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1 think that there is no debate that Mr. Wedd is in a criminal
2 history category of I. Therefore his guidelines are light.
3 There's not a chance that I would impose a life sentence. That
4 is not on the table. And so we are talking about a
5 nonguidelines sentence right out of the box.

6 And so I think people -- I do not see the government
7 asking for a guideline sentence and I would not impose a
8 guideline sentence in this case.

9 So we are talking about a variance. We'll deal with a
10 departure request in a moment, but let's just get that off the
11 table. All right.

12 So let's just go to the issues that Mr. Sercarz has
13 raised. I can deal, I think, pretty easily with the Miao and
14 the Digi-CF pieces. But I'm going to ask the government to
15 respond both to those, but also to the part of the conspiracy
16 for \$112 million that deals with other aggregators, so I'll
17 come back to that. But in terms of whether or not it was
18 reasonably foreseeable that Miao would auto-subscribe all of
19 the numbers, I believe it was reasonably foreseeable, for
20 several different reasons: one, it doesn't appear that Mr. Wedd
21 got himself into the weeds of exactly how Mr. Pajaczkowski
22 would be in fact assisting Miao with auto-subscribing. There
23 was a general sense that he would assist him in a manner that
24 ought to lead to less risk of detection. But how exactly that
25 would be done, whether that would result in a reduced

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1 percentage or any particular percentage auto-subscribing is not
2 something as to which there was testimony.

3 It was, however, on the other hand, quite well known
4 that, by this point in time, when the Tatto scheme was agreed
5 to, that Miao was a disreputable character, an individual who
6 had engaged in auto-subscribing, and who didn't really seem to
7 have any particular moral compass. So it was well and truly
8 something that could have been reasonably predicted that Miao
9 would, through a venal impulse, try to take as much as he could
10 possibly take from any auto-subscribing opportunity made
11 available to him. So I don't find persuasive and did not find
12 persuasive in the submission the argument that the Miao scheme,
13 the Tatto scheme, was anticipated to be only 30 percent of its
14 denominator, versus a hundred percent, based upon a sense of
15 trying to only auto-subscribe a portion of the phone numbers.

16 As to Zhenya, for that, the argument, as I understand
17 it, is really that the Digi-CF, that it was not foreseeable,
18 really, that they were going to be auto-subscribing and that
19 there was not an auto-subscribing conspiracy, that they were
20 somehow -- there was a revenue share in place for the, as
21 they've been described, pre-provisioned short codes. I
22 actually don't think that that is supported, well supported by
23 the evidence. I understand that it's the argument that the
24 defense had made and made it to the jury that Digi and CF were
25 really -- that the moneys flowing in through those companies

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1 could have been anticipated to simply be just short code
2 revenue shares. I don't find that persuasive at all. I think
3 that there was ample evidence that I found reliable and
4 persuasive that Digi and CF were set up for the purpose of
5 auto-subscribing, that they were known to be directed towards
6 that endeavor, and that in fact they did auto-subscribe, and
7 that the moneys were understood to be the proceeds of
8 auto-subscribing. So for that argument I also put that to the
9 side.

10 I would, however, like to hear whatever additional
11 points the government would like to make on either of those, as
12 well as the argument that some portion of the \$112 million
13 relates to proceeds from Mr. Miao, or Tatto, for other
14 aggregators, and whether or not other aggregation proceeds was
15 related conduct and/or reasonably foreseeable.

16 Mr. Cooper.

17 MR. COOPER: Yes, your Honor. So I'll start there.
18 First, the number does include proceeds that Miao obtained from
19 auto-subscribing on other mobile aggregators. It's the upper
20 left-hand corner of Government Exhibit 1401, MBlox and
21 OpenMarket in addition to Mobile Messenger.

22 There are three reasons why the inclusion of that is
23 appropriate here. First, from a reasonable-foreseeability
24 standpoint, at the time that Mr. Wedd joined the conspiracy in
25 October 2011, Mr. Wedd knew that Miao had been auto-subscribing

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1 on other mobile aggregators in addition to Mobile Messenger.
2 There was that string of e-mails, the Court may recall,
3 Government Exhibits 185, 186, and 187, at the last trial, where
4 Mobile Messenger employees were discussing having been
5 auto-subscribed -- I believe this is in the August, September
6 2011 time frame -- having been auto-subscribed by Miao-owned
7 companies on other mobile aggregators.

8 There is also sufficient evidence to find by a
9 preponderance that Mr. Wedd himself had been auto-subscribed on
10 a Miao short code on a different mobile aggregator.

11 So from the perspective of, at the time Mr. Wedd
12 joined the conspiracy, whether he had a basis to understand
13 that Miao was already doing similar things with other mobile
14 aggregators, there certainly was. And the Court sees that sort
15 of thing all the time. The most common example, in my mind, is
16 a narcotics conspiracy, where if a member joins knowing that
17 co-conspirators have already been selling on other blocks in
18 other areas and has a good sense for the scope of that, they
19 are responsible for what happened before. But the case here is
20 much stronger than that, because the loss amounts attributable
21 to Mr. Miao auto-subscribing on other aggregators are from time
22 periods after Mr. Wedd joined. So if there's a question as to
23 whether it was foreseeable to him that Miao was doing this and
24 others, it certainly was.

25 THE COURT: Isn't there an argument, though, just sort

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1 of an easier road, which is, you can take those amounts out and
2 still be above the threshold for the 2B1.1(b)(1)(M) guideline
3 provision which provides for the increase of over 65 million.

4 MR. COOPER: Yes. Those would be the third point.
5 But even subtracting out those others, the CF and Digi consumer
6 loss, plus the Mobile Messenger-related Miao consumer loss gets
7 you over the 65 million.

8 The other point to make on this particular issue is
9 that Mr. Wedd got paid a percentage of all Miao
10 auto-subscribing regardless of whether it occurred on Mobile
11 Messenger, MBlox, or OpenMarket. Mr. Pajackowski testified to
12 that, and that's the transcript at page 265.

13 So in terms of his involvement being auto-subscribing
14 on the other aggregators, it was well proven at trial.

15 The only other point on this topic, in addition to the
16 fundamental point that, even subtracting out OpenMarket and
17 MBlox, you still get above the guidelines hump of \$65 million
18 dollars, is that in October 2011 when Miao met with Mr. Wedd,
19 Miao disclosed to Mr. Wedd that he had been doing this, in
20 other words, he had been auto-subscribing on MBlox.

21 THE COURT: I am persuaded that the record supports by
22 a preponderance of the evidence a loss amount that is greater
23 than \$65 million but less than \$150 million. Where it falls
24 within that range I need not determine, because I find that it
25 reaches the point where it triggers the 24-level enhancement --

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1 or increase in the offense level, I should say, not
2 enhancement -- but does not go over the \$150 million, by a
3 preponderance of the evidence. And I base that upon the
4 Court's view that, first of all, it's not necessary that I
5 include the OpenMarket or MBlox amount in order to even get
6 there. But second of all, even if I did, for essentially the
7 reasons that Mr. Cooper has stated, it's supported by the
8 record. So I will find by a preponderance of the evidence that
9 loss amount.

10 I should also note a few additional points about the
11 factual underpinnings for this, which is that I do believe that
12 the record supports -- I should say all my findings today that
13 are factual in nature are based upon a preponderance of the
14 evidence -- that Mr. Wedd understood what the auto-subscribing
15 business -- the kind of breadth that Miao was capable of and
16 Zhenya was capable of given the breadth of the business that
17 Mobile Messenger was in -- in other words, there were just
18 millions of phone numbers that could be used -- and therefore
19 that there was a reasonably foreseeable huge scope for this.

20 I also believe that it's well supported by the record
21 that Mr. Wedd understood exactly what Paj could do for Miao and
22 how Paj and others could assist Zhenya both in setting up a
23 scheme and then proceeding with it, and that the numbers --
24 also that Mr. Wedd was aware of the amount of money that was
25 coming in at various points in time to his companies, and it

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1 was reasonably easy to extrapolate from that an increase in the
2 overall amount or what the overall amount would have been that
3 would have been given to the other co-conspirators, including
4 the large amounts given to Zhenya and to Miao.

5 One point that I want to address very specifically is
6 whether or not there should be any reduction or alteration in
7 the loss amount due to amounts returned to consumers. That was
8 a point that was alluded to in the defense submission. I do
9 not find that there is any basis for such reductions. The
10 basis for such reduction that was alluded to was some sort of
11 almost like an offsetting principle. But it is quite clear
12 from the way in which a loss amount is calculated that
13 reductions are only available when it's by the defendant or
14 others jointly working with him before the fraud is detected,
15 and that the point of the deductions, or reduction, is really
16 if somebody has learned that -- or comes to view their behavior
17 as wrongful and is able to start making it right at a point
18 prior to when law enforcement or somebody else decides that
19 they've been caught, that there is some benefit that should be
20 given for that.

21 Here, however, there is no evidence that the -- in any
22 significant way, that the co-conspirators, or in particular
23 Mr. Wedd, themselves are responsible for the amounts returned
24 to consumers. That has been done by another victim and series
25 of victims here of the fraud, which were some of the telephone

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1 companies, have actually refunded some of the money. That is
2 not the kind of reduction or offset that was anticipated by the
3 guidelines. And so I don't find that it's applicable here.
4 Therefore the loss amount I do find is at the range as I've
5 described it, which has a base, so we now would increase the
6 offense level by 24 levels. So it's 7 at the base, plus 24.

7 Let's go on to the next piece, which is the ten or
8 more victims. I didn't see any argument from the defense that
9 that is not applicable. I think it's reasonably applicable
10 based upon paragraph 79 of the PSR, along with testimony and
11 exhibits that indicate that there were thousands of individuals
12 who were victims. So that would add two additional offense
13 levels.

14 Is there any additional argument anybody wants to make
15 about that?

16 MR. SERCARZ: No.

17 THE COURT: OK. Then sophisticated means. That's
18 under 2B1.1(b)(10)(C). Again, I think there really is not an
19 argument that's been made here that does not apply. The use of
20 shell companies and the layers of shell companies is certainly
21 in and of itself sufficient to support that determination.
22 Also the process, for which there is a great deal of evidence,
23 of spoofing the double opt-in, the entire technological process
24 that was put in place here is sufficient to support the
25 inclusion of the sophisticated means enhancement. And so I

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1 would refer to paragraphs 39 to 41 of the PSR, 43, and 44, 49,
2 51 to 53, and 56 to 59, and also to application note 2B1.1,
3 application note 9. And so I think that there's ample basis to
4 include sophisticated means.

5 Is there any additional argument anybody would like to
6 make about that?

7 Hearing nothing, let's go on to the next one, which is
8 that the defendant was convicted back under Section 1956. That
9 is under 2S1.1(b)(2)(B), the basis for an inclusion of two
10 additional levels. Any argument about that?

11 MR. SERCARZ: No.

12 THE COURT: OK. The next one, which is contested, is
13 for the role adjustment. And that's under 3B1.1(a). The
14 question is whether or not Wedd was an organizer or leader of a
15 scheme that involved five or more participants or was otherwise
16 extensive under the meaning of the guidelines. Here, there's
17 been briefing by both sides on that point. And I do find that
18 there is a sufficient factual basis to find that Mr. Wedd was
19 an organizer or leader that involved five or more participants
20 or was otherwise extensive. The basis for that is that, while
21 Miao and even Zhenya were also undoubtedly leaders -- for Miao,
22 for instance -- we'll take each of those schemes separately.
23 For Miao, he was a leader of the scheme in one sense, but also
24 there was another leader for the aggregation side. It was the
25 individual who gave the authorization for the scheme to occur

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1 on the Mobile Messenger platform, and then essentially
2 organized and gave authorization to individuals under him to
3 proceed with executing on that scheme. And that was
4 Pajaczkowski. And Pajaczkowski testified persuasively to the
5 Court that Mr. Wedd really was the one who introduced
6 Mr. Pajaczkowski to this opportunity -- it didn't happen the
7 other way around -- and that Mr. Wedd was in fact necessary for
8 Mr. Pajaczkowski to have gotten involved here.

9 For Zhenya, the scale of the Zhenya, Digi, and CF
10 schemes was such that, without Mr. Wedd's involvement, it is
11 exceedingly unlikely that they could have occurred, and indeed
12 there is no evidence that they would have occurred in the
13 absence of his involvement. While there was the Assifuah
14 scheme and so there is some demonstration that auto-subscribing
15 was able to occur without Mr. Wedd, that scheme, as we know,
16 failed quite quickly and without having really taken root. CF
17 and Digi we know were being monitored as among the largest
18 clients of Mobile Messenger. They very quickly became the
19 largest clients. And there is no indication that their
20 business was other than auto-subscribing.

21 So I do find that there is a sufficient factual basis.

22 In addition, in terms of extensiveness, I should say,
23 there were millions of -- well, thousands of consumers,
24 millions of dollars that were obtained from the scheme. The
25 scheme was nationwide. And, again, it required layers of

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1 companies.

2 So I believe that the role adjustment is appropriately
3 includable for those factual reasons. Apart from what you
4 folks have already argued in your papers, is there anything
5 else you would like to add?

6 MR. SERCARZ: Only this, your Honor, since we're still
7 on the subject of the guidelines -- and I do it at the risk of
8 further damaging my credibility -- my client was the chief
9 operating officer of Mobile Messenger. In that position, there
10 is no question but that he would have had to sign new
11 contracts. He would have been in effect the gatekeeper. I
12 quoted from the record as to those efforts by Mr. Pajackowski
13 and Mr. Eromo to describe my client's role in the offense, and
14 I would respectfully submit that they groped for terminology
15 that would be useful and terminology beyond that according
16 simply to someone who was in the position of authority over the
17 company. I don't believe the guidelines were structured in
18 such a way that it is automatically, when it comes to these
19 calculations, that the person who has the most authority in the
20 company is by that definition in a leadership role with regard
21 to unlawful conduct that is taking place at the company.

22 I acknowledge -- and I'm going to talk about this a
23 little bit later -- that the defendant can be punished and
24 perhaps should be punished, given his role, given his authority
25 over the company as a whole, but since we're still discussing

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1 the guidelines, for whatever this is worth to the Court, your
2 Honor, I respectfully submit that the fact that my client was
3 the chief operating officer of the company does not make him
4 ipso facto the chief operating officer of the fraud at the
5 aggregator.

6 THE COURT: All right. So let me just take that head
7 on, which is, I do not base the Court's finding on a mere
8 position. As I've described -- and we can rely only on the
9 Miao-Tatto situation for this point -- it's quite clear to the
10 Court -- and I do credit that Mr. Miao asked Mr. Wedd whether
11 he could auto-subscribe, and Mr. Wedd, in the Court's view,
12 agreed, that he could and that he would assist in that process,
13 and went back to his company to provide the structure for that
14 to be able to occur and to facilitate it. So it's not the
15 position of authority as chief operating officer, it is his
16 direct and active involvement at the highest level that the
17 Court based its finding on.

18 But let me also make another point so that you
19 understand where my head is during this proceeding, because I
20 think it's a relevant point to the overall situation. I don't
21 find that Mr. Wedd was conscious -- that the basis for
22 knowledge was conscious avoidance. It is my view that he
23 understood and knew and participated directly and actually and
24 fully, and was all in on the auto-subscribing. It was not
25 happening without his awareness, without his involvement. I

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1 don't think at this point in time that there is any real, in my
2 view, serious basis to believe otherwise. So that is therefore
3 inconsistent with the view that simply his position as COO is
4 the basis for my findings.

5 I think we've all made our record on this. And so I
6 will add the four levels for the role adjustment.

7 We get to obstruction of justice. I think my comments
8 that I just made just now on my view as to Mr. Wedd's position
9 indicate that I am not of the view that conscious avoidance is
10 the basis for a finding of knowledge. But let me just also
11 then go on to why I think that there is a basis for the next
12 enhancement, which is obstruction of justice.

13 Obstruction of justice. I think that we -- I don't
14 know that anyone disagrees that, under Section 3C1.1, perjury
15 is a basis, under Application Note 4(B), for the inclusion of
16 an obstruction of justice enhancement. I do believe that there
17 is an ample basis in the record to find that Mr. Wedd was
18 knowledgeable about auto-subscribing directly and clearly. He
19 was not under any mistaken impression about this. There were
20 meetings in which he participated where this was discussed,
21 where the nuts and bolts of it were agreed to, where he himself
22 agreed with Miao. It's too consistent, too persuasive, for any
23 other determination.

24 Based upon that, the testimony that you folks, the
25 defense cited was testimony where it was amenable to an "even

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1 if" argument, which is, even if you accepted that testimony,
2 there was still a consistent way of finding lack of perjury.
3 That let's put to the side. Let me just read into the record
4 several portions of the trial testimony that are the basis for
5 the Court's finding of perjury.

6 Transcript page 1487 and 1488:

7 "Q. Mr. Wedd," he was asked on direct, "did you knowingly and
8 intentionally participate in a conspiracy to defraud consumers
9 through auto-subscribing?

10 "A. No, I didn't."

11 That's perjury.

12 "Q. Did you knowingly and intentionally engage in financial
13 transactions designed to conceal or disguise the nature,
14 location, source, ownership, or control of the proceeds of
15 auto-subscribing?

16 "A. No, I did not.

17 "Q. Did you knowingly use telephone numbers of the auto-
18 subscribers to auto-subscribe these customers?

19 "A. No, I didn't.

20 Page 1548, line 22:

21 "Q. Mr. Wedd, did you ever authorize Mr. Pajaczkowski to
22 provide" --

23 sorry. Let me skip that one altogether because I'm
24 trying to focus on the other one.

25 1614.

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1 "Q. Did you ever agree to allow Tatto to auto-subscribe on
2 Mobile Messenger's platform?

3 "A. No, I didn't.

4 "Q. Did you knowingly receive proceeds from auto-subscription
5 that took place by Tatto?

6 "A. No."

7 1649.

8 "Q. Did you know that either one of those companies," which
9 were CF and Digi in the prior Q and A, "was using their short
10 codes to engage in auto-subscribing in your aggregation
11 platform?

12 "A. No, I didn't."

13 Page 1651:

14 "Q. Did you become aware of that money you were receiving from
15 Zhenya as part of this revenue share was the proceeds in
16 auto-subscribing activity?

17 "A. No, I didn't."

18 1656:

19 "Q. Did you ever agree with anyone to engage in
20 auto-subscribing activity?

21 "A. No, I didn't.

22 "Q. Did you engage in auto-subscribing activity?

23 "A. No, I didn't did.

24 "Q. Did you ever use telephone numbers for the purpose of
25 engaging in auto-subscribing activity?

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1 "A. No.

2 "Q. Did you ever knowingly receive money that you knew was the
3 proceeds of auto-subscribing activity?

4 "A. No, I didn't."

5 So the basis of the Court's finding that there was
6 perjury is those Q and As. I would note that there were also
7 similar Q and As at the prior two trials, at trial I, trial II.
8 That perjury was designed to mislead the jury, to influence the
9 jury into either a hung result or into a defense verdict, and
10 therefore it was an attempt directly to change the prosecution
11 in the defendant's favor. So I do find that the obstruction of
12 justice is appropriately includable.

13 That then adds two additional levels.

14 Is there any additional argument, other than what you
15 folks have already included in your papers, that you'd like to
16 raise right now?

17 OK. So the next one is the abuse of position of trust
18 or use of special skill. The government requests this
19 enhancement. If you look at the application notes for this
20 particular provision in the guidelines, that when you are using
21 your position to transfer a means of identification, as used
22 under 18 U.S.C. 1028(d)(7)(C) and (D), that that can be the
23 basis for the abuse of position of trust, that provision, that
24 statutory provision, refers to telecommunication, identifying
25 information, and unique electronic identification numbers.

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1 Those are in turn properly considered to be the equivalent of
2 cellphone numbers from consumers.

3 In addition, the Court finds that that provision
4 refers to a position of private trust as well as public trust,
5 so I'm focused here on private. It need not only be a
6 fiduciary, in the way in which a fiduciary in a trust, for
7 instance, is considered. It can be a position of trust. Here,
8 as evidenced by the statutory reference to the means of
9 identification, Congress had already previously linked position
10 of trust to one, an individual who had access to means of
11 identification and then misused that access in a manner to hurt
12 consumers. That's what occurred here. And the Court finds
13 that, in Mr. Wedd's position as COO, he set the direction and
14 tone of the company and got his highest-level folks organized,
15 among the highest-level folks organized to engage in this
16 fraud. He had managerial discretion to do so, but more
17 importantly than just having that discretion, he in fact
18 utilized it for this. His position did contribute to the
19 facilitation of the scheme, by allowing Tatto to move the codes
20 over, by signing, as I've said, the CF and Digi contracts, but
21 also, more importantly, by concealing proceeds through the
22 multiple layers of companies, and also concealing and assisting
23 in the concealment of the activity overall.

24 So the application of this enhancement is consistent
25 with the statute, the congressional intent, and the case law in

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1 this area. So I do find that that is the -- the two levels are
2 applicable. Anybody want to add anything to what they have
3 already said?

4 The last arguments are relating to a request for a
5 downward departure. I am not going to depart. I am going to
6 vary downwards. But it won't be a departure. I have looked at
7 the *U.S. v. Algahaim* case. There I would note, first of all,
8 there was a base offense level of 6, not 7. It wasn't the
9 highest. But there was argument that the exponential
10 increase -- it was, I think, three times in that case -- of the
11 base offense level by the loss amount was something that the
12 court could take into consideration and, by virtue of the
13 remand, should take into consideration, when determining
14 reasonableness of overall sentence. That is certainly true. I
15 am considering the loss amount in connection with Mr. Wedd's
16 behavior. I've already indicated that my intention is to vary
17 downwards, that while there is a very large amount of money at
18 issue and it does increase Mr. Wedd's guidelines by a lot
19 because of that, I am allowing for consideration of the extent
20 to which Mr. Wedd's overall punishment should not be based
21 purely on some sort of numerical algorithmic or other simple
22 loss enhancement number.

23 I would also, however, note the argument that there
24 were overlapping enhancements for the same conduct. That was
25 another argument that was made. I don't find that that is in

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1 fact the case here. Each of the particular provisions that we
2 talked about that have led to enhancements are seeking to
3 address separate behavior, in terms of, for instance, the
4 number of victims, which is consumer oriented, the role
5 adjustment, which has to do with the manner in which the
6 defendant actually executed the scheme, the obstruction of
7 justice, in terms of the jury particularly. The abuse of
8 position is really about the ability to utilize a particular
9 data set. So these are not the kind of multiple overlapping
10 enhancements that one sees, for instance, in something like the
11 child pornography cases, where it can really become more truly
12 overlapping.

13 Then there is also an argument about disparities in
14 other sentences between -- in a number of instances where fraud
15 sentences are not guidelines sentences in this district as well
16 as elsewhere. I am taking that into consideration in terms of
17 a variance. And that is part of my determination as to why a
18 variance here is appropriate.

19 I think based upon what I've said, we end up at an
20 offense level 45, which then adjusts downwards to 43 because
21 the maximum offense level under the guidelines is 43. Is there
22 anything that -- that's where I'm ending up. Is there anything
23 anybody would like to add?

24 All right. The Court does confirm the guideline as
25 43. What that means in terms of months is, if there are eight

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1 counts of conviction, six of which have 20-year mandatory --
2 sorry, not mandatory -- 20-year maximum sentences, the maximum
3 statutory penalty for six of the counts are 20 years, and so
4 because it would otherwise be indicated as life, you take the
5 240 months of each of the separate counts of conviction,
6 multiply it by 6. So it's 240 times 6, which equals 1440.
7 That is the number of months attributable to the nonaggravated
8 identity theft counts. Count Three and Count Seven are
9 aggravated identity theft. They were separate and treated
10 differently because they have two-year mandatory consecutive
11 sentences. That is both the mandatory sentence and the maximum
12 sentence. And so it's 24 months for each of Count Three and
13 Count Seven. It's a total of 48 months. And so the way to get
14 the number of months for the guidelines calculation is to take
15 240, multiply it times the six counts of conviction, come up
16 with 1440, then 24 months times 2 for Counts Three and Seven.
17 That's 48 months. That adds up to a total of 1488 months, is
18 the guidelines range that is possible, given the statutory
19 maximum sentences for this defendant.

20 Is there any additional point anybody would like to
21 make?

22 MR. COOPER: No.

23 THE COURT: No. All right. Let's go on, then, to the
24 next piece, which is to hear from you folks. And we've been
25 going for almost an hour. We can do two things. One, we could

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1 take a very short break now, or we could just go right into it
2 and then finish. But I'm thinking that you folks may want to
3 talk for a little while. And so maybe we should just take a
4 very short, like three-minute break now, stretch our legs, and
5 come back? All right. Let's do that. Let's take a very short
6 break and come back. Thank you.

7 (Recess)

8 THE COURT: The way in which I typically proceed is, I
9 have the government go first, the defense counsel go second,
10 and then lastly give defendants the opportunity to have the a
11 last word before sentence is imposed.

12 Mr. Cooper?

13 MR. COOPER: Thank you, your Honor. At the outset, we
14 just note that there's certainly, based on the letters and the
15 presence in the courtroom, there's a lot of friends and family
16 support from Mr. Wedd. And the letters that the defense has
17 submitted do describe one side of the defendant that the Court
18 certainly should take into account as a factor under 3553(a).

19 But it's clear to the government that the letter
20 writers don't know the side of Mr. Wedd that was illuminated
21 through the trials in this courtroom. And we want to discuss
22 that side and a few of the sentencing factors that are
23 applicable there, in particular, the seriousness of the
24 offense, the defendant's role in the offense and lack of
25 remorse, and the particular need here for general deterrence.

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1 So I'd like to take each of those in turn. First, in
2 terms of the seriousness of the offense, this, as we say in our
3 submission, was a true Main Street crime. The victims here --
4 and the PSR says thousands. We believe the number approaches
5 the millions. The victims of this offense came from all walks
6 of life. The only limiting factor here was people who had the
7 misfortune to have their cellphone numbers in the Mobile
8 Messenger database for one reason or another. That was the
9 only limiting factor.

10 And so folks who were victims of this fraud ranged
11 from the very wealthy to the people who could not afford on a
12 monthly basis to have \$10 stolen from them. And the defendant
13 here knew full well that, for many of the victims, that
14 incremental ten dollars might mean the difference between
15 having their cellphone operate the next month and having it
16 shut down for lack of service.

17 At trial, the Court may recall, there was testimony
18 from the defendant about his billability project at Mobile
19 Messenger, which was an analysis to determine which telephone
20 numbers would be able to be billed. The Court may remember
21 there were some limitations like people who have prepaid
22 cellphones, people whose cellphones may be shut down if a
23 premium SMS charge were to be placed on that phone. So the
24 defendant knew full well that sending out these charges to
25 people who hadn't authorized, asked for, or accepted them

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1 could, for many of those victims, be the difference between
2 having their cellphone, which is a vital link to the world
3 nowadays, between having that and not having that. And that is
4 quite significant in the government's view.

5 In that regard, one aspect of the defense's written
6 submission struck us as particularly problematic, and we
7 address it in our submission, but I do want to amplify it
8 today. There was a suggestion, in a few places in the
9 submission, that somehow the defendant should be given somewhat
10 of a benefit because the average loss amount to consumers was
11 relatively low, \$10, \$20, maybe \$30. And that is a very
12 dangerous assertion for a couple of reasons. First, people who
13 have money stolen from them, \$10 at a time, are every bit as
14 deserving of the protection of our laws as wealthy individuals
15 who have millions of dollars stolen from them. There should
16 not be a distinction, in terms of number of victims, based on
17 that.

18 That type of thinking is essentially carrying forward
19 the type of thinking that Mr. Wedd and his co-conspirators
20 operated under at the time they committed the fraud, which is,
21 if we do a little bit of fraud over a large number of people,
22 the chances of success, the chances of getting away undetected,
23 are going to be higher. And indeed, if you step back and think
24 about it, it makes this type of fraud much harder to detect,
25 because people who are penalized \$10 at a time might be less

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1 inclined at the outset to even notice that they were the
2 victims of a fraud, but even more, once they notice, there is a
3 lot less incentive for them to go forward and report the fraud,
4 to contact the police, to contact the FBI or the IRS, to even
5 complain to the telephone company, because of the low value.
6 There are many who may just have paid the amount without
7 thinking about it, thinking it was an additional surcharge or
8 tax that the telephone company put on their bill and that they
9 had to pay it.

10 And so in terms of incentives to victims to report,
11 it's just that much harder when you have a lot of victims who
12 are stolen from a little bit at a time. So we believe there
13 should be no benefit given to the defendant based on the
14 average loss amount. If anything, it's more pernicious to have
15 a fraud that steals a little bit at a time from a lot of
16 people.

17 The second point we want to make is about the
18 defendant's role in the offense and lack of remorse. The
19 defendant's submission pits him in a certain sense as a pawn of
20 Miao and of Zhenya and of others acting within Mobile Messenger
21 in an unscrupulous fashion. I'm not going to belabor this
22 point because the Court has already indicated that the Court
23 does not view this as a crime of a conscious avoidance but
24 rather as a willful and intentional crime. But the point I do
25 want to make is that the defendant's role here was absolutely

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1 essential. He was the but-for cause of millions and millions
2 if not hundreds of millions of dollars of loss. And he has
3 shown a complete lack of remorse, in his testimony at trial and
4 in the sentencing submission where he essentially blames others
5 and asserts that this was at most a case of negligent
6 supervision rather than intentional and willful conduct.

7 His own letter doesn't address the offense. Now,
8 that's his right and we understand he's preserving his appeal
9 rights, but nothing in the letter puts in context, or seeks to
10 explain the conduct at issue. Nothing makes it any bit less
11 willful and intentional than it actually was.

12 And the last point we want to make is on general
13 deterrence. There are really two separate points here. The
14 first, which will I'll describe first, is a similar general
15 deterrence point as the Court sees for any similarly situated
16 white collar fraud defendant. The second one is particular to
17 this offense. But first, this is a crime that appears to have
18 been committed for two motives: first, for the defendant's
19 personal financial benefit, and, second, for the financial
20 benefit of the defendant's company, Mobile Messenger. On the
21 first part, as the trial evidence showed, during the time the
22 defendant engaged in this conduct, he lived a high-flying,
23 lavish lifestyle. There was testimony in the exhibits about
24 expensive cars, multimillion-dollar real estate, major
25 investments in Hollywood productions. So in part he stole from

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1 victims, from main Street victims, to fund his own lavish
2 lifestyle.

3 The second part was to help his company. And to be
4 clear, that's a new defense and the government does not believe
5 that that in any way mitigates the extent of the harm of the
6 conduct. The fact that some part of the motive was to help a
7 corporation that he was wound up in rather than himself does
8 not mitigate the harm here, because from the victims'
9 perspective, it doesn't matter whether the money was stolen to
10 go to some car or some apartment building or to go to help prop
11 up Mobile Messenger's revenues to make their quarter numbers or
12 their year-end numbers. The fact is that the money was stolen
13 and Mr. Wedd was central to that.

14 The white collar fraud defendants like Mr. Wedd should
15 factor in the fact that if they get caught, there will be a
16 substantial term of imprisonment out there, when they decide
17 whether or not to engage in fraud.

18 But the second element is particular to this crime.
19 And we discuss this a bit in our submission. Mr. Wedd was
20 essentially synonymous with Mobile Messenger in the United
21 States. As he testified to, he was the first employee in the
22 U.S. He raised his hand. He came here, and he built a company
23 in the United States. He rose to the seniormost position. And
24 he used the company and its facilities to commit this fraud.

25 The compliance function at this company, at Mobile

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1 Messenger, was corrupted by Mr. Wedd. Now, to be sure, others,
2 including Mr. Pajaczkowski, bear their fair share of
3 responsibility. But Mr. Wedd is the one who created this
4 culture of individuals with respect to auto-subscribing using
5 their positions to get money. He's the one who used Mobile
6 Messenger's compliance function, that should have been looking
7 out to detect crimes, to stop them, and to report them to law
8 enforcement, he is the one who told Miao, go see Paj, go see
9 the head of compliance, he's going to be able to help us keep
10 this crime undetected so we can get more money.

11 And that is a particularly pernicious factor when you
12 think about corporate crime, the fact that this sentencing is
13 an opportunity to send a message that compliance functions at
14 companies, like the one at Mobile Messenger, should not be
15 corrupted, should not be perverted, to advance individuals'
16 corrupt ends, but should be doing what it's supposed to be
17 doing, which is to be a watchdog on the lookout.

18 Other than that, unless the Court has particular
19 questions, we'll rest on our submission.

20 THE COURT: Thank you, Mr. Cooper.

21 MR. COOPER: Thank you, your Honor.

22 THE COURT: Mr. Sercarz.

23 MR. SERCARZ: Thank you, your Honor.

24 Your Honor, there are three things that I'd like to
25 do, and I'll try and do them quickly. I want to talk about the

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1 government's sentencing submission and the comments that were
2 just made by Mr. Cooper. I want to talk about the concept of
3 deterrence, which clearly is an important goal in any sentence
4 and which it is clear will be an important goal in this one.
5 And then finally, I want to talk about the defendant's
6 character.

7 First of all, there's something that has to be stated
8 and made very clear right at the outset. The government
9 devoted a great deal of its argument just now to the
10 defendant's sentencing submission and how the defendant's
11 sentencing submission indicates a lack of remorse and indicates
12 to the government certain tell tale things about the
13 defendant's character. So let's be absolutely clear. He
14 didn't write that submission. I wrote that submission. I
15 wrote that submission because I'm his lawyer. I wrote that
16 submission because I have an obligation to him. I wrote that
17 submission because, in the guidelines regime in which we
18 operate, I have an obligation to try and mitigate the damage
19 that occurs from the kind of piling on of points that probably
20 became apparent to everyone in the audience and that has caused
21 judges in this district and elsewhere to decry the outcome of
22 the guidelines calculation in white collar cases.

23 And to give but one clear example, the submission that
24 I made is attacked because the fraud is a fraud on a broad
25 market which does not damage to any great extent individual

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1 victims, thereby making it less likely for them to complain and
2 thereby making it less likely for the fraud to be detected. I
3 want to quote to the Court from the guidelines themselves and
4 the downward departure considerations at Section 2B1.1(C),
5 "Downward Departure Consideration." "There may be cases in
6 which the offense level determined under this guideline
7 substantially overstates the seriousness of the offense. In
8 such cases, a downward departure may be warranted. For
9 example, a securities fraud involving a fraudulent statement
10 made publicly to the market may produce an aggregate loss
11 amount that is substantial but diffuse, with relatively small
12 loss amounts suffered by a relatively large number of victims.
13 In such a case, the loss table in subsection (b)(1) and the
14 victims table in subsection (b)(2) may combine to produce an
15 offense level that substantially overstates the seriousness of
16 the offense. If so, a downward departure may be warranted."

17 That was my use of the guidelines to try and mitigate
18 the damage that is done to my client by these guidelines, which
19 I respectfully submit give the Court at best a color-by-numbers
20 opportunity to create a portrait of my client. But soon
21 enough, your Honor, you won't be sentencing the crime; you'll
22 be sentencing the individual that sits next to me. And knowing
23 you as I do after having spent my three trials in here, you
24 have enough information, enough capability of nuance, enough
25 wisdom to offer a sentence in this case which is not a

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1 color-by-numbers sentence of this defendant.

2 Is this a serious offense? Yes. All right, hell yes.
3 But that's the beginning of the inquiry, not the end of the
4 inquiry in this case. With all due respect to the government.

5 With regard to the issue of deterrence, I've spent
6 enough time in here, and I've taken up enough time that I hope
7 the Court will accord me an additional two minutes to tell you
8 the story which has the virtue (a) of being true, and (b) it
9 doesn't have a street lamp in it. OK. In 1986 I was a young
10 pup in this practice, and I came to a firm which was named
11 Sercarz Schechter & Lopez. And the lead partner, who put his
12 name last deliberately, Frank Lopez, was among the most
13 ingenious lawyers that I've ever had an opportunity to
14 encounter. And he handled more than his fair share of the most
15 complex organized crime and narcotics cases ever tried in the
16 courthouse across the street. And among them was the trial in
17 the organized crime commission case. And it was Frank Lopez's
18 ingenious idea that the head of the Colombo crime family, who
19 had already been sentenced and given a life sentence in the
20 Colombo organized crime case, ought to represent himself in the
21 commission case so that the Court would have an opportunity to
22 hear from him without the necessity of Mr. Persico having to
23 testify under oath. The defendants were convicted in short
24 order, and they were sentenced before Judge Richard Owen in the
25 building across the street. And it was clear which way the

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1 wind was blowing after about two or three sentences. The first
2 two heads of the families received a hundred years' sentence.
3 And it came time for Mr. Persico and a defendant named Gennaro
4 Langella, who Frank Lopez represented at the proceeding, to
5 take their turn before the bench. Frank turned to the judge
6 and he said, your Honor, my client finds himself in very much
7 the same position as that great American patriot, Nathan Hale;
8 he regrets that he only has one life to give to his country.
9 The judge laughed out loud and gave him a hundred-year
10 sentence.

11 I tell you this story for two reasons. The Court can
12 take a broader view of the concept of deterrence. It's been
13 from 1986 to 2017, your Honor. Serious crimes continue to be
14 committed, crimes that involve death, personal injury, the
15 distribution of narcotics on the large scale, fraud on the
16 markets, and I'm going to urge the Court, before you impose
17 sentence in this case, to take a moment to consider whether the
18 experiment that is the sentencing guidelines and the imposition
19 of these enormous guidelines based on no factor more than the
20 concept of fraud loss are really yielding the kinds of results
21 that are warranted in these cases.

22 I also tell you the story for another reason. If my
23 memory serves me correctly, every defendant in that courtroom
24 was eligible for parole after ten years. The people who
25 crafted the sentencing regime in that day and age had the

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1 wisdom not to impose upon judges the requirement that they make
2 a futuristic prediction about when it is that a defendant will
3 be fit to return to society. It enabled a parole department to
4 make that decision in real time, based on a real evaluation of
5 the defendant, with time for heads to cool and time to evaluate
6 the defendant's sentencing adjustment. And you don't have that
7 opportunity in this case. No judge has it, in a guideline
8 case. Instead, your Honor, what you do have is the principle
9 of parsimony. There are requirements that are supposed to
10 guide the court in imposing a sentence. And in every sentence
11 the court is tasked with imposing a sentence that is sufficient
12 but not greater than necessary to meet the goals of sentencing,
13 deterrence, general and specific, and those other goals that
14 are enumerated in the statute and with which the Court is well
15 familiar.

16 I recommended a sentence in this case. And I didn't
17 do it to pick a number to start a negotiation. I did it
18 because I hoped to help frame the debate. You took the bench
19 in the Fraser Thompson sentence. You said, I have a range in
20 mind. And it provided a landscape for negotiation. I came to
21 you with a number, 84 months, seven years, and I asked the
22 question, what is the marginal deterrent value, what is the
23 marginal additional deterrent value, what additional number is
24 sufficient but not greater than necessary to meet the goal of
25 deterrence, to speak to that goal specifically. And I make the

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1 observation, your Honor, that these three trials and these
2 proceedings did not occur in a vacuum. This was a heavily
3 regulated industry. The dominoes began to fall in 2013 with
4 actions by state attorney generals, with an FTC proceeding that
5 resulted in obtaining for consumers tens of millions of dollars
6 that had been taken from them. And that is a factor to be
7 considered under the subject of deterrence as well. Money for
8 victims is one of the goals of deterrence.

9 I would make the observation that, in considering the
10 defendant's sentence, the Court also needs to consider the fact
11 that he is deportable. And I commend to the Court's attention
12 the letter by Mr. Sickler, who is an expert in the field, the
13 content of our submission, and the fact that any sentence that
14 is imposed is going to be more onerous on my client in several
15 respects. He's already been remanded based on flight risk,
16 part of which no doubt came from the fact that he is not a
17 citizen of this country.

18 The defendant is going to be subject to conditions of
19 security throughout the period of his incarceration that are
20 more onerous than the defendants similarly situated will have
21 to endure. The defendant will not receive good-time credit.
22 The defendant will not have the opportunity to participate in
23 the kind of enrichment programs that are ordinarily afforded to
24 defendants similarly situated who find themselves in the
25 custody of the Bureau of Prisons. The defendant's security

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1 level is going to be impacted, with all that that means -- and
2 I commend you to Joel Sickler's letter. At the end of this
3 term, the defendant will not have the opportunities for home
4 confinement, supervised release, community confinement that are
5 ordinarily afforded to defendants under his circumstances. The
6 defendant will be held in jail for an extra length of time
7 while the efforts are made to put him into a location from
8 which he can properly be removed to the country of his birth.

9 All of this, most respectfully, is a part of the
10 basket that goes under the title "deterrence." Anybody who
11 looks at the sentence that this defendant is going to be made
12 to endure has to understand all of what befell my client
13 beginning in 2014, not only what happens to him in this
14 courtroom.

15 Excuse me for one moment.

16 The government made an argument which, with no
17 disrespect intended to Mr. Cooper, for whom I have enormous
18 regard, strikes me as glib, and it's one that I want to treat
19 for the rest of my comments. He says to you that the people
20 that have traveled all this way -- and there are people that
21 have come from a long way to be here today -- they know the
22 Darcy Wedd that they met on the outside, but they don't know
23 the Darcy Wedd that was illuminated by the events that were
24 portrayed in this courtroom. And I respectfully submit that
25 people do not develop two characters. My client has but one

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1 character. If you're looking for the acid test of character --
2 and I'm going to go into this in a little bit more detail
3 momentarily -- then I commend you to the presentence report at
4 paragraph 112, your Honor. I read the transcript of the Fraser
5 Thompson sentencing, and my eyebrow went up and I smiled when
6 the Court talked about how so often in fraud cases you can go
7 to the financial affidavit and find evidence of -- and I'm
8 going to use your word -- shenanigans, in quotes, and that may
9 be a very good way to see, to measure a defendant's level of
10 remorse and what a defendant is really about. For whatever
11 this is worth, your Honor, here's another test that maybe you
12 can employ in some case in the future to help the Court make
13 that same sort of determination. When you read character
14 letters on behalf of a defendant, you'll take them and
15 presumably you'll apply some sort of a discount and say, these
16 are people that love the defendant; maybe they're people that
17 have gotten something from the defendant when he was rich and
18 when he was riding high. So my suggestion is this. To the
19 extent that you're able to find it, look for the statement by
20 the estranged family member. Look for the statement by the
21 ex-wife. Look for the statement by the disgruntled employee.
22 And then you won't have to apply that discount before you
23 really get to the nub of the defendant's character.

24 This is the defendant's ex-wife, your Honor, Melanie
25 Camp. And I quote: "During a recent telephone interview with

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1 Ms. Camp, she informed that in September of 2007, they met in
2 Las Vegas, Nevada. She corroborated their separation and
3 divorce. According to Ms. Camp, their marital problems
4 surfaced prior to his arrest. Ms. Camp believes that the
5 defendant's addiction to alcohol may have contributed to their
6 marital problems. In terms of his arrest, Ms. Camp stated that
7 she was surprised and she finds it difficult to comprehend
8 because she knows some of his co-conspirators. Ms. Camp
9 reported that she respects the criminal justice system.
10 Reportedly she has never known the defendant to act out of
11 malice or greed." Let me repeat: never known him to act out of
12 malice or greed. "According to Ms. Camp, the industry is
13 complex. In general she described the defendant as someone who
14 is generous and supportive, both emotionally and financially to
15 others, including family members. Ms. Camp stated that she has
16 no ill will toward the defendant and wishes him well."

17 Your Honor, you received 57 letters, some of them as
18 late as today. But there's one character letter you haven't
19 read yet. That's my character reference for my client, Darcy
20 Wedd. The following is my character reference for my client.

21 "This sentencing proceeding represents a daunting task
22 for me. The sentencing guidelines call upon this Court to
23 impose upon him a sentence that would result in his
24 imprisonment for the rest of his natural life. Your Honor, I
25 cannot compete with your wisdom or your experience in handling

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1 sentences under the guidelines regime. Moreover, the firm of
2 Paul, Cooper & Beidel is far more adept than I at harnessing
3 the case law commentaries and the guidelines themselves in
4 support of what they deem to be an appropriate result in this
5 case."

6 And as I speak to you now, my heart is in my throat.
7 Your comments thus far and at prior sentences leave me with the
8 concern that, in your view, my client is a smooth-talking
9 defendant with no regard for the results his behavior had on
10 the welfare of those whose lives he touched. If that's the way
11 you feel, most respectfully, you have him pegged wrong. You
12 see, I know the character of this man better than the rest of
13 those involved in these proceedings. I've represent him for
14 the better part of three years. I've met with him together
15 with other lawyers and their clients in Los Angeles, and I've
16 met with him alone in my office in New York. I've been his
17 advocate and seen him through the crucible of three trials.
18 I've waited with him while three juries deliberated on his
19 future. And I was the one who sat with him, your Honor, in a
20 jail cell and told him that his beloved father had passed away
21 and would never be there to see him again. In short, while
22 I've always been with him while he has operated under the
23 stress of a criminal indictment and an uncertain future, I have
24 been with him when life seemed, relatively speaking, to be
25 good, and I've been with him when it was not so good. And

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1 here's what I've learned. First of all, if a person's
2 character is defined by how he or she behaves when no one is
3 paying attention, you only need to read the letter of one
4 person, his cell mate, Mr. Van Manen, to learn all that you
5 need to know about Darcy's character.

6 Mr. Van Manen, for those in the audience, was an
7 inmate who was plopped into Darcy's jail cell very shortly
8 after he arrived there and suffering through the ravages of
9 withdrawal from a serious heroin addiction.

10 "When Mr. Van Manen was placed in that cell with
11 Darcy, he didn't know anything about Darcy's background. He
12 didn't know about the charges against this defendant. He
13 didn't know that Darcy, newly deposited on 9 South himself, was
14 terrified. All he knew was that he was dealing with the
15 ravages of heroin withdrawal and Darcy was there to help.

16 "Your Honor, I submit to you that the reason why some
17 white collar defendants eventually return to criminal activity
18 is that they cannot function without the power and the wealth
19 and the status conferred by their fraudulent conduct. But on 9
20 South Darcy had no power. Darcy had no wealth. Darcy came
21 armed only with his good character. He wore his prison
22 jumpsuit, not a fancy set of clothes. He didn't drive a
23 Bentley on 9 South. The only armature he had is his good
24 character, the one good character that he possesses. And he
25 did what he's always done. He offered his care and attention.

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1 He helped.

2 "This Court need have no worry about how Mr. Wedd will
3 perform in the world when he leaves his jail cell for the final
4 time.

5 "Second, in its sentencing submission, the government
6 describes Mr. Wedd as having been remorseless, in perpetrating
7 the fraud of which he has been convicted. The glib response
8 would be to say that no one feels remorse while they're engaged
9 in criminal conduct. I have further responded by indicating
10 that, to the extent that the sentencing submission is perceived
11 by the government as limiting a lack of remorse, that was my
12 submission.

13 "But I know a little bit more about the meaning of
14 remorse, and I know a little bit more about the nature of my
15 client's character. I've encountered my share of defendants
16 who, when confronted with overwhelming evidence of their guilt,
17 quickly determine that it was in their own selfish best
18 interest to immediately enter a guiltily plea and/or
19 participate with the government in the process of apportioning
20 blame. The authors of the federal sentencing guidelines have
21 seen fit in their wisdom to reward this behavior with three
22 points off for acceptance of responsibility. The government in
23 its wisdom has seen fit to reward its witnesses with the
24 expectation of a sentence reduction pursuant to the standard
25 cooperation agreement employed here in the Southern District.

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1 I'm all too familiar with transactional remorse, with
2 institutional remorse. When Darcy testified at the first trial
3 and Mr. Cooper questioned him, as he did, as he had every right
4 to do, as he should have done, about the many ways in which he
5 could have stopped Lin Miao from further engaging in
6 auto-subscribing when he learned about it at that meeting in
7 San Diego, in response to one of Mr. Cooper's questions, Darcy
8 added to his answer: 'I know I could have done more and I'll
9 regret it for the rest of my life.' Mr. Cooper said that was a
10 nonresponsive answer, and in the context of the trial, he was
11 right. It may not have been relevant then, but it's relevant
12 now, your Honor. My client, Darcy Wedd, is full of remorse.
13 His remorse is real. He's remorseful for the harm done to the
14 countless innocent victims whose monthly phone bills were
15 padded.

16 But that's not the true measure of his remorse. His
17 remorse is something he can't run away from. It comes to him
18 at night before he gets up in the morning. It comes to him
19 before he engages in the chores of an orderly. It comes to him
20 before he goes up to the 11th floor to exercise on the roof and
21 after he's on the way back down. It's a searing pain that
22 comes to him whenever he thinks about what he did to put
23 himself here. And I know he experiences this pain because I
24 know about this man. I understand about this man. And the
25 pain comes from the fact that he knows in his soul that he

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1 could have done more to be part of the solution for premium
2 short messaging service, and he could have done less to be part
3 of the problem."

4 And, your Honor, that searing pain is the best
5 insurance that you have that Mr. Wedd will never again grace
6 the doors of a courtroom as a criminal defendant once he
7 secures his release.

8 "Third" -- and I don't have much more to go. This
9 filibuster is almost over. "At all three trials, I described
10 Darcy has someone who has an appetite for adventure and a
11 thirst for risk. Of course when I said this I was referring to
12 his decision to come to New York, where he had no family or
13 friends, to rent an apartment on John Street, with a bedroom
14 and a living room big enough to hold a desk, and to establish
15 Mobile Messenger here in the United States. This Court, which
16 possesses a remarkable skill at remembering statements by
17 counsel and remaining counsel of their words, at what may be
18 the most unfortunate of times, reminded me of my words when it
19 was considering whether or not Mr. Wedd was a flight risk at
20 the time of his remand. Your Honor, I stand by this situation
21 of my client. And fully mindful that you will have the last
22 word in this case, I would suggest this: Personal growth is
23 nothing less than a lifelong adventure. And change, real
24 change, requires courage, flexibility, and a willingness to
25 embrace risk. Darcy has those characteristics in abundance.

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1 And they will serve him well in the sentence that he must
2 engage, your Honor.

3 "In conclusion, what I would say is this. All I've
4 learned about this man tells me that whatever sentence you see
5 fit to impose, he'll bear up under it with good grace. He
6 simply knows no other way.

7 "As always, your Honor, I thank you for this
8 opportunity. Maurice Sercarz, the guy who helped tie up your
9 courtroom for the better part of 2017."

10 THE COURT: Thank you, Mr. Sercarz.

11 Mr. Wedd, would you like to address the Court before
12 sentence is imposed?

13 THE DEFENDANT: Yes, just briefly, your Honor. A lot
14 of what I wanted to say was just recounted by Maurice. What I
15 would like to say to you is that I'd like a second chance. I
16 know that I have a lot to offer. I've got plans for how I'm
17 going to approach my sentence in a positive way, not just for
18 myself but also for the people that -- whose paths that I
19 crossed. But I just want to do something after my -- after I'm
20 released that better matches my personality.

21 And that is all I have to say. I'm sorry it wasn't
22 very eloquent. But I just appeal for a second chance, and I
23 know I do a lot to offer. Thank you, your Honor.

24 THE COURT: Thank you, Mr. Wedd.

25 Imposing sentence is the hardest things that a judge

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1 does, because it's one human being sitting here looking another
2 person, another human being in the face, in the eyes, Mr. Wedd,
3 and telling you how long you're going to spend behind bars.
4 And when I do that, it is the most humbling thing I can do, and
5 a kind of power that I don't think any single person should
6 have. If sentencing could be done differently, I would have
7 three judges do it, and we would come up with a way in which
8 the three judges would, together, arrive at a sentence that
9 would reflect a spectrum.

10 But that's not the way our society has seen fit to
11 sentence defendants. And so I try very, very hard to ensure
12 that I have considered what I think other judges would find
13 reasonable. I know that there are judges who find sentences I
14 impose unreasonable. And I know there are judges who find the
15 sentences are reasonable. And what I try to do is, for every
16 single sentence, come up with one that's reasonable, that is
17 sufficient but not greater than necessary.

18 Defendants like you present a very difficult
19 situation, because I have sat with you through three trials and
20 I have seen you through three trials, and I understand that
21 you're not a bad guy. And I find, with, frankly, with a lot of
22 fraud defendants, frankly, Mr. Thompson, since Mr. Sercarz has
23 read that transcript -- I said similar remarks then -- they can
24 often be very charming. They're usually highly intelligent,
25 more educated than not, and they're people who, like criminals

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1 of -- who've done other kinds of crimes, are multifaceted.
2 They're not all bad. They're not all good. They're not
3 defined by all the goodness that's in their character letters
4 or all the badness that's found within their crimes. There's a
5 complexity to the human spirit. There's a complexity to human
6 nature. And that's what I find.

7 With you, it is important that you understand the
8 sentence that I impose, because, while there are a lot of
9 people here, as I also say at sentences frequently, you are the
10 only one who is actually going to go to the cell after this and
11 have to start serving that time. Indeed, you've already begun
12 to serve that time.

13 So I'll explain it to you as best I can and hope that
14 when you think about on this proceeding, you will understand
15 that even if you don't agree with it, you at least heard the
16 words that I put around it as the reason for the sentence and
17 understood that I thought about it, very long and very hard.

18 I have to start with the guidelines, but I also have
19 to ask whether they're reasonable. I've told you folks already
20 in this proceeding that the guidelines suggest life, and I am
21 not -- that life is not on the table, that I am not considering
22 a life sentence. This is not that kind of crime. Your conduct
23 was not that kind of conduct.

24 I nevertheless then go to where, then, in the range
25 below life do we fall. It's a big range. You're 41 years old.

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1 40. Soon to be 41. Right? Sometime this year. 40 years old.
2 And, God willing, there's a lot of life ahead of you. And so I
3 have to turn to these factors, the 3553(a) factors in the
4 federal sentencing statute. And they ask the Court to come up
5 with what is a sufficient but not greater than necessary
6 sentence, that reflects a variety of purposes of sentencing.
7 They are captured in different words. They are captured in
8 things like general deterrence and personal deterrence and
9 seriousness of the offense. And they're captured in things
10 like whether or not there are educational, medical,
11 correctional, or vocational treatment that is needed, whether
12 or not a particular sentence promotes respect for the law,
13 whether or not a particular sentence is a just sentence. And
14 ultimately what they're doing is, they're trying to capture
15 sort of the philosophy of sentencing behind that, whether it's
16 retribution for the victims, for our society, where the social
17 contract has been violated, whether it's some concept of
18 rehabilitation, or incapacitation, and other concepts that were
19 put in there.

20 So I start off with the seriousness of the offense.
21 People often find that to be the least attractive part of any
22 sentencing proceeding because it goes back that's not about
23 just who the defendant is in terms of the mitigating factors,
24 but also it's really about why we're here at all, which is,
25 what is the crime. We've already, I think, had some discussion

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1 of that already. It was a massive fraud that touched at least
2 many thousands of people, and it touched them in a way that was
3 particularly pernicious, because, while it didn't take a large
4 sum from any one of them, it caused a large number of them to
5 have discomfort, pain, hardship at varying levels, depending
6 upon their personal circumstances, while their money, whether
7 it was perhaps just an annoyance to them that they lost 9.99,
8 or perhaps a hardship to them, where they could not pay their
9 bill because they lived paycheck to paycheck and couldn't get a
10 phone company to refund it quickly enough and had a bill that
11 they then couldn't meet. Across that spectrum, the human
12 experience lies for the victims. And there were thousands of
13 them.

14 And these were people, some of whom for sure, were
15 individuals who earned minimum wage. So for the \$10 that went
16 into not even a cocktail that it was used for when it was given
17 to somebody as a result of the fraud and then used to pay some
18 bill that happened to be associated with cocktails on the
19 beach, that \$10 represented them standing at the counter for an
20 hour, maybe a little more. It represented them doing whatever
21 it was that they had to do just to be able to have that money
22 taken and used for whatever pleasurable expense, to buy part of
23 a Bentley, to buy property, I don't know.

24 But the reason that I am here to impose sentence is
25 because we have deemed as a society that the victims need a

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1 voice, that society has to say, you cannot do this without
2 stopping and understanding the cost, the cost both to violating
3 our social compact and then the cost to the real human beings
4 who you affect.

5 So I think about the nature of your crime. I think
6 about the victims. I think it was a crime that had so many
7 deliberate moments in it, so much intentional conduct. I
8 reject entirely the idea that you didn't know exactly what was
9 happening and agreed to engage in it, for whatever reason,
10 sufficient unto yourself. I do hope you would never do it
11 again. I do hope that that is behind you, that life will take
12 you in different places.

13 There is unfortunately a high degree of recidivism for
14 fraud. That's not true for everyone. And hope springs
15 eternal, has to; otherwise we get very discouraged doing what
16 we do.

17 So I start off and I think a lot about the seriousness
18 of the offense and I turn to who you are. And I think you've
19 been different people at different times in your life. You've
20 always been a hard worker. Even when you were at Mobile
21 Messenger committing fraud you were a hard worker. It's not
22 like you weren't showing up to work and putting in a lot of
23 hours and trying, at the same time that you were committing
24 fraud, to take the business in a different direction. That's
25 just part of the complexity of who you were. You worked when

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1 you were young. You worked hard as a young boy, so far as I
2 can tell from the letters and from your own letter and from
3 your mother's letter, from how it's progressed throughout. But
4 you were somewhere who, somewhere in there, was able to
5 essentially take from others, maybe without really realizing
6 that the people that you encountered every single day you might
7 have been -- the valet at the hotel that you would stay at
8 where you would have your car parked, it may have been that
9 valet you were you auto-subscribing. So when you were giving
10 them that tip, that tip was coming back at you. Unclear.

11 There's a callousness in the behavior that needs to be
12 recognized. And I do recognize it. On the other hand, I do
13 also want to give you credit for and recognize the part of your
14 person that's hardworking, that has established longterm,
15 important friendships, family relationships. I think it was
16 the aunt of your girlfriend who put in the photograph. And I
17 looked at that photograph quite a lot, because it made you
18 human, in a group, a large group of people, at a point in time
19 when you were under indictment, going through these trials.
20 And it's a statement about people's belief in you that's very
21 powerful, because it's a large family who embrace you and
22 embraced you.

23 So I look at that too and I think, this is not some
24 social -- you know, there's no pathology here that's evidenced
25 in any way that is pronounced in terms of some ability or

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1 inability to create loving, supportive relationships. Those
2 are the best indicia of where you'll be later in life.

3 So I then think about, OK, what are the purposes of
4 sentencing. So now I know this individual has got parts of his
5 humanness that are parts that will be able to give back to
6 families to people to society down the road. I also believe
7 that it's somebody who needs to be punished for what he did.
8 Where on the spectrum of between today and life do we stop?
9 It's a big range.

10 So what I think about is, what are the purposes of
11 sentencing? How much do you need for personal deterrence? How
12 much do you need for general deterrence? How much do you need
13 for general deterrence? How much of that should weigh on you
14 in your life versus spread out over a number of sentences over
15 time?

16 And I want to ensure that there aren't undue
17 sentencing disparities between you and other defendants or you
18 and other people who have committed fraud crimes in this
19 district. And I think about all these things.

20 So where do I come out? I come out higher than your
21 lawyer and lower than I was before I walked in here. I come
22 out in a place where it is my view that a total sentence of ten
23 years, all together, is appropriate, is sufficient but not
24 greater than necessary. It will serve the purpose of general
25 deterrence because the ten-year sentence will be known as a

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1 ten-year sentence. It will be referenced as a ten-year
2 sentence. And that's a long time. That's a big sentence. 48
3 months of that are split between Counts Three and Seven. Count
4 Three is 24 months. Count Seven is 24 months. They are
5 consecutive to the remaining 72.

6 Did I get that right? Let me do my math. I just had
7 it written down. Is that correct?

8 MR. SERCARZ: You're correct. 120 months in total.

9 THE COURT: 120 months all together.

10 Now, I also take into account Mr. Sickler's piece.
11 I've already taken that into account. I was actually, when I
12 walked out here, I will tell you that I was at 14 years. And
13 as I think about it, it is my view that the ten-year sentence
14 will serve one of the primary purposes of general deterrence,
15 because it will be referenced as a ten-year sentence. And so I
16 think that that is sufficient and not greater than necessary.

17 It is very important that I also take into
18 consideration the fact that you will be in deportation
19 proceedings after this and that I recognize that you will be in
20 a facility where you will not get time off for good behavior,
21 that you will not have the same kind of programs and
22 opportunities that other defendants will have, and that all of
23 those things serve to increase the way in which your time is
24 experienced as hardship. And so therefore I think that the ten
25 years is an appropriate sentence here.

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1 There will be also three years of supervised release.
2 And I should say, of the 72 months, the 72 months are for all
3 of the other counts, not Three and Seven, but all other counts,
4 for each one of them, imposed separately and to run
5 concurrently. So that what we have is, Counts One, Two, Four,
6 Five, Six, Eight will be 72 months. Counts Three and Seven
7 will be 24 months each, for a total of 120 months.

8 A three-year period of supervised release for all
9 counts, not Counts Three and Seven, all other counts. One, you
10 shall cooperate in the collection of DNA. Two, you shall not
11 possess a firearm or other destructive device. Three, you
12 shall not commit another federal, state, or local crime. Four,
13 you shall not illegally possess a controlled substance. Five,
14 you shall refrain from the unlawful use of a controlled
15 substance and may be drug tested. And, six, you must pay any
16 forfeiture obligation in restitution.

17 You have to provide the Probation Office with any
18 requested financial information, is a special condition, as
19 well as submitting your person, vehicle, place of residence to
20 reasonable searches as reasonably requested by probation. You
21 shall not open any new credit card charges or credit lines
22 without approval of probation. You shall notify the U.S.
23 Attorney's Office within 30 days of changing your residence.
24 You shall obey all immigration laws and directives of the
25 immigration authorities.

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1 You shall report to the nearest probation office
2 within 72 hours of your release from custody. And you shall be
3 supervised in your district of residence.

4 There's a special assessment of \$800. That's \$100 for
5 each of the counts. And I have to impose that and I do impose
6 that.

7 I'm not going to separately set a fine, because you
8 will have a very significant forfeiture and restitution
9 obligation, in the millions of dollars. And I ask the
10 government, if it's still changing, to -- actually, the
11 restitution will be different -- to give the Court a final
12 order of restitution and forfeiture within 90 days. The
13 forfeiture is for properties and be proceeds traceable to the
14 offense. Restitution is for identifiable victims. It's also
15 forfeiture of the amount that he had received. As you folks
16 know, the law relating to forfeiture is different today than it
17 was in the early part of 2017. And so the forfeiture amount
18 does take into consideration recent Second Circuit case law in
19 that regard and Supreme Court case law in that regard.

20 So I'm not going to state the amount unless you've got
21 an amount right now that can be stated. Otherwise it's -- I'd
22 ask that you confer with counsel on the amount. I believe
23 you'll be able to reach an amount where appeal rights are
24 maintained.

25 Mr. Cooper.

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1 MR. COOPER: Your Honor, we're still discussing with
2 Mr. Sercarz, we believe that the correct forfeiture amount is
3 \$1,742,583. I believe there may be a dispute between the
4 parties as to whether that's appropriate or whether a lower
5 number is appropriate. We can put in a letter to the Court, in
6 the event that we're unable to reach an agreement in the next
7 few days, put in a letter outlining our position.

8 THE COURT: All right. Mr. Sercarz, would it be
9 acceptable to you if the Court left this proceeding open while
10 we do that?

11 MR. SERCARZ: It is. And so you understand the nature
12 of the dispute, I argued at three trials that the defendant did
13 not receive additional money from Tatto. I remind the Court
14 that all the money that Mr. Wedd received came from Concise
15 Consulting, a business that was controlled by Paj, and I argued
16 using Government's Exhibit 1401 that he received the same
17 amount of money in total as Fraser Thompson, which is logically
18 inconsistent with the notion that my client was being paid on
19 two conspiracies rather than one.

20 I think we are going to agree on a great number of
21 properties which are going to be signed over to the government
22 in order to meet my client's forfeiture obligation. I would
23 hope that the Court treats the issue of restitution in the same
24 way that it did with regard to Fraser Thompson, but I have a
25 feeling that the Court may be asked -- I have to talk further

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1 with my client -- just to make a finding as to whether or not
2 the government's number concerning the forfeiture is correct.

3 THE COURT: All right. So why don't we do this. Why
4 don't we keep the proceeding open for one week, only for the
5 purpose of solidifying the number relating to forfeiture and
6 for restitution. If, after you folks have put in a letter or
7 dueling letters on that, if we need to have another session
8 where we go only over those amounts, we can do so. If people
9 are prepared to have the Court rule and not require this
10 proceeding to be held with all of us in attendance, then please
11 let me know that and I'll be guided by you. But certainly we
12 can be present in court if people believe that it's important
13 to do some.

14 So those amounts will be determined on consent after
15 this session today.

16 Is there any legal or other reasons why sentence
17 should not be imposed as stated?

18 MR. COOPER: No, your Honor.

19 MR. SERCARZ: No. I have one request with regard to
20 designation, now or later.

21 THE COURT: All right. Let me just make sure I don't
22 forget these pieces.

23 I do impose sentence as stated.

24 There aren't any open counts. He was tried on the
25 indictment. Or are there, underlying? There is no underlying

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1 indictment, OK. So that's dismissed.

2 Now, Mr. Wedd, you have a right to appeal. Any notice
3 of appeal needs to be filed within 14 days of the filing of the
4 judgment of conviction. If you cannot afford the cost of
5 appeal you can apply to have those costs waived. It's called
6 proceeding in forma pauperis, and you have a right to apply to
7 proceed in that manner.

8 All right. Now, Mr. Sercarz, I'm ready for your
9 request.

10 MR. SERCARZ: Thank you. It's a bit complicated, so
11 forgive me, your Honor. In my conversations with Mr. Sickler,
12 he indicates to me that it's all but a formality and the
13 defendant is going to end up being designated to a contract
14 facility rather than one operated by the Bureau of Prisons.
15 But to the extent that there is flexibility and to the extent
16 that the Court wishes to see the defendant in an environment
17 where he has the same opportunities as other inmates, our
18 request would be that the defendant be designated, at least in
19 the first instance, to LFCI Allenwood in White Deer,
20 Pennsylvania, and be afforded the opportunity to participate in
21 the prison's institutional hearing program, to address removal
22 proceedings, and that the defendant not be designated to one of
23 the BOP's privately contracted facilities for sentenced aliens.

24 "The Court" -- and this is language we would ask the
25 Court to include -- "The Court does not want this defendant

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1 designated to Moshannon Valley CI."

2 I can hand this up to the Court. You can rule on it
3 in any way you wish, your Honor. That would be our request.

4 THE COURT: All right. Let me ask the government, do
5 they have any position one way or the other?

6 MR. COOPER: No position.

7 THE COURT: I will not order that, but I will make a
8 recommendation that will track that language.

9 MR. SERCARZ: All right.

10 THE COURT: All right. The Court will make that
11 recommendation.

12 Is there anything further that we should do today?

13 MR. SERCARZ: No. Thank you.

14 THE COURT: All right. Thank you. We are adjourned.

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